

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1954

No. 12,186

LOUIS H. SAPER, As Trustee in Bankruptcy of
The Westex Company, Inc. *Appellant*

v.

UNITED TYPEWRITER COMPANY, INC., *Appellee*

Appeal From The Judgment Of The United States District
Court For The District of Columbia

MARK P. FRIEDLANDER,
HYMAN GOLDSTEIN, and
NORMAN FREEDENBERG,
Attorneys for Appellee,
Rm. 502, Hill Building,
839 17th Street, N.W.,
Washington 6, D. C.

QUESTIONS PRESENTED

In the opinion of Appellee the questions are:

1. Where an export firm obtained from a broker a list of items that a supplier offered for sale and where the export firm arranged a sale of said items to a foreign company, was agency established between the exporter and the supplier, so that supplier is liable for exporter's misrepresentations, particularly when broker only offered to sell items to the export firm, which firm, instead of accepting or rejecting the offer, re-offered items to a foreign buyer?

Another question is:

2. May a suit by a Trustee in a corporate bankruptcy, to require Appellee to pay a third person on a judgment against the corporate bankrupt, be maintained, where said bankrupt estate is without assets and no benefit could possibly accrue to the bankruptcy estate, and particularly where the corporate bankruptcy was voluntary and filed a long time after bankrupt corporation had ceased to do business?

Another question is:

3. Where alleged agent, on July 18, 1950, seeks exoneration from an alleged principal from the effects of a damage action brought against the alleged agent in December of 1945, is such exoneration suit barred by laches or the statute of limitations, particularly where no possibility exists for alleged agent to be forced to pay any judgment, because said alleged agent is a no-asset bankrupt corporation?

Another question is:

4. In an exoneration suit based on a claim by an alleged agent that his alleged principal sold and delivered misrepresented articles and caused alleged agent to be subjected to a judgment by the purchaser for damages arising out of such principal's negligence or misconduct, need said alleged agent prove the misconduct or negligence or is the same presumed from the existence of the judgment?

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In July of 1944 Sidney A. Inman was engaged in the general brokerage business in Washington, D. C. with offices in the Union Trust Building. At that time Appellee, United Typewriter Company, was engaged in the business of selling office equipment and typewriters in the District

of Columbia with offices at 813 Fourteenth St., N. W. Neither Inman nor United Knew each other or had engaged in any transactions between them prior to the occurrences herein stated.

The Westex Company was a corporation organized under the laws of the State of New York (R. 99) with only office space (R. 116) and three to six employees (R. 116). The date of incorporation is unknown (R. 99). At this date we are not told who was its president and, outside of one Block, its stockholders are unknown (R. 100). Although Block refused to divulge what other business he was engaged in (R. 123), he did say he spent very little time on Westex affairs, not more than twice a month (R. 102). One Deering was an employee of Block in another company (R. 105), and was not connected with The Westex Company (R. 104). One Brodigan was general manager of The Westex Company and had practically unlimited authority (R. 101-103). The Westex Company acted as manufacturer's representative for certain domestic companies selling in the export field (R. 106), but the sale of typewriters was out of the ordinary run of Westex' business (R. 103).

Inman had become acquainted with Deering when they were in the War Production Board and, in July of 1944, Deering contacted Inman and advised him that he, Deering, was associated with Westex which was a financially responsible organization (R. 150) and was in the market for a number of items for export, including railroad equipment, earth moving equipment, trucks, office equipment, and other similar items (R. 177). Inman secured and furnished Deering with the information requested, but the source of supply was not to be revealed (Ex. 4a) so that if Westex did not take the offerings Inman wanted to offer it to other prospects (R. 151). Included in this information was an offering from United Typewriter for used office equipment, (Ex. 4) Inman having made his contact with United Typewriter through information obtained from the War

Production Board (R. 177). Inman was acting as a broker and offered to sell this equipment to The Westex Company (R. 119 & 177). He never offered nor sold to the Chilean agency (R. 177). His contacts all were with The Westex Company or its employees (R. 178 & 182).

Deering, upon receipt of the offering reported to Brodigan and Block (R. 105) that he, Deering, had a lot of typewriters for sale (R. 140), or could get a lot of typewriters. He submitted a list of them and wanted to know whether Westex would buy them (R. 104, 105 & 121).

Discussion ensued between Brodigan and Block and, as a result, Westex, offered the typewriters for sale to three foreign companies (R. 107).

As a result of what Westex learned from its correspondence with the Chilean company, Brodigan contacted Inman and agreed to take the merchandise (R. 181), but Inman discovered that during the several weeks between the date of the delivery of the list to Deering and the acceptance, the biggest part of the listed merchandise had been sold (R. 181). When Westex learned this they instructed Inman to acquire comparable or better equipment (R. 181).

Westex apparently purchased this equipment (R. 184, 126) and then Westex sold the same to the Chilean agency (R. 126), but the purchase price paid by the Chilean agency was in a letter of credit form (Ex. 75 ABC) to Inman. Westex charged more than Inman had charged them (R. 171, 172-174). The Chilean agency, in October of 1944, attempted to cancel the sale (Ex. 31) but Westex refused on behalf of its principal, Sidney Inman (Ex. 37) (R. 130) on the grounds that the keyboards had already been converted and many of the typewriters had already been packed (Ex. 37) (R. 130-132). The representations of Westex to the Chilean agency went far beyond the original specifications for the sale (Ex. 1) (R. 132).

The merchandise was shipped through Gerhard & Hey Co., which was employed by and known to Westex and not the United Typewriter Company (R. 134).

2. The merchandise was delivered and Sidney Inman paid United Typewriter, and The Westex Company obtained its share. The Chilean agency complained of the shipment in 1944 (R. 38), and brought suit against The Westex Company for damages on December 24, 1945. The Westex Company *did not make any demands on United Typewriter to defend nor was any claim ever asserted at that time that Westex considered itself as agent of United. Nor was any credible evidence offered that any funds were expended by Westex in defense of the case* (R. 140).

However, United Typewriter allowed Westex to use all its records, and the principal officer of United and its principal superintendent of repairs voluntarily appeared as witnesses in New York at the request of counsel for Westex.

In December of 1948 Westex ceased to do business* and in January of 1950 the cause came on for trial. Verdict and judgment were entered in favor of the Chilean agency against Westex. Westex had no assets and was not engaged in business at that time. Nevertheless, Westex went into bankruptcy and the counsel for the Chilean agency were appointed to represent the trustee in bankruptcy in a suit for damages. Suit for damages by the trustee of The Westex Company vs. United Typewriter Company was filed in July of 1950. This was authorized by the Bankruptcy Court. But it became apparent that the "alleged agent" Westex, not having paid the judgment, could not recover thereon against its "alleged principal", and thereupon, by amendment, the Appellant herein changed its cause of action to one of "exoneration", the Trustee in Bankruptcy seeking to require the United Typewriter Company to pay a judgment in favor of the Chilean agency. It is this complaint for exoneration and the answer thereto that was before the Court.

* The bankruptcy petition and Statement of Affairs was filed in the District Court and is part of the record there. The Statement of Affairs prepared by Westex shows that it ceased to do business on December 31, 1948.

The Original Cause of Action For Damages Was Not a Proper Cause And Did Not State a Cause of Action Upon Which Any Relief Could Be Granted.

Appellant is the Trustee in Bankruptcy of the Westex Company, Inc. The Westex Company, Inc. filed a petition in the District Court of the United States for the Southern District of New York, voluntarily seeking to be adjudicated a bankrupt. This was done at the beginning of February in 1950. The record shows that the company had no assets at the time of the filing of the petition and has none at the present time. The principal creditor is the Compania Commercial Chilean Agencies, S. A. This company was represented in the filing of its claim by the firm of Kommel & Rogers, New York attorneys. Prior to the bankruptcy the Compania Commercial Chilean Agencies, S. A. had sued Westex for breach of contract and had recovered a large judgment. No action had ever been brought in the District of Columbia against the Appellee prior to June of 1950 when the present suit for damages was initiated.

The Westex Company had ceased to do business in December of 1948* and was not engaged in any business at the time of the trial of the law suit in January of 1950.

After the judgment was taken against The Westex Company it filed its petition in bankruptcy. The Trustee in Bankruptcy selected by the bankruptcy court petitioned and had appointed the said Kommel & Rogers as attorneys for the Trustee, and also petitioned and received authorization to bring a damage suit against the Appellee. To the damage suit an answer was filed by said Appellee and a motion for summary judgment also submitted. In support of the motion for summary judgment the Appellee submitted that it was not liable to the Trustee because the bankrupt corporation had not paid the judgment.

The basic principle of law invoked was that an agent is indemnified only against loss and not mere liability.

* The bankruptcy petition and Statement of Affairs was filed in the District Court and is part of the record there. The Statement of Affairs prepared by Westex shows that it ceased to do business on December 31, 1948.

The text writers are unanimous on the above proposition and clearly show in their writings that an agent, in order to recover against his principal, indemnification, must show he has actually sustained a loss. —Meecham, On Agency, Second Edition, paragraph 1613, Vol. I, page 1208; and Restatement of Law, Agency 2, Chapter 14, Sec. 438, wherein it is stated:

“... The right to exoneration, with respect to transactions as to which the principal is also liable, is enforceable only in equitable proceedings; unless the agreement with the principal so provides, the agent is not entitled to recover in an action at law an amount for which he, together with the principal, has become liable but which he has not yet paid. . . .”

Although there do not seem to be many cases on this point, a case strikingly similar in facts and definitely stating the law as here indicated, is *Walkof v. Fox et al*, 153 NYS 27. In that case a trustee in bankruptcy of a bankrupt company brought an action against the principal for liabilities created against the bankrupt agent in a deal where the agent acted for the defendant. The New York court held that a principal is undoubtedly liable to his agent for any loss which the agent incurs through the performance of any actions directly by the principal to be performed in his behalf; but it is definitely held that, until actual loss resulted to the agent from such liability, the agent could not recover and thus unjustly enrich himself.

The courts have therefore refused to permit an agent to recover against his principal the amount of the liability, which may have even been reduced to judgment, until the agent has paid or satisfied the judgment and the liability has been changed to an actual loss.

Other cases exactly on point are: *Brown v. Mechanics' and Traders' Bank*, 44 NYS 645, 16 App. Div. 207; and *Otter Creek Labr. Co. v. McElwee*, 37 Ill. App. 285, in which the Court said, in part:

"The general rule that an agent who incurs losses in obeying instructions of his principal, is entitled to indemnity from his principal is not questioned, but in the nature of things no right of action can exist for the loss, until the loss has been, in fact, sustained."

The true rule is definitely established that a principal impliedly agrees to reimburse the agent for loss, but does not agree to indemnify him against liability.

In the case at bar the Compania Commercial Chilean Agencies, S. A. obtained a judgment against The Westex Company, Inc. The Westex Company, Inc., instead of paying or attempting to pay the judgment, took bankruptcy and wiped out the obligation. It did not pay it, nor did it diminish any assets of the company in attempting to pay the judgment. Therefore, it follows that its Trustee in Bankruptcy cannot now recover any part of the so-called obligation because it has never suffered a loss.

THE EVIDENCE DID NOT DISCLOSE THAT THE WESTEX COMPANY WAS THE AGENT OF UNITED TYPEWRITER

Not only does the evidence obtained from the depositions of Inman and Block affirmatively show no agency between Westex and United Typewriter, but the letters written and which have been offered and received in evidence support the position of Appellee.

No attempt here will be made to review all of the correspondence and exhibits, they numbering eighty-five, but only a few will be discussed. Exhibit No. 1, a letter dated July 19, 1944, from The Westex Company to the Chilean agency, contains the following:

"The prices which we have shown on specification sheet are our own purchase prices and we thought it best to leave the resale price to your discretion both sharing equally in the sales proceeds."

It is interesting to note that this is the letter referred to in Exhibit No. 70, a letter of February 9, 1945, containing

the complaint by the Chilean agency to Westex about the typewriters it had received. In this letter to Westex by the Chilean agency, of February 9, 1945, reference was made to Westex' letter of July 19, 1944, which, in the opinion of the Chilean agency and in Appellee's counsel's opinion, constituted the contract upon which the sale was made.

It will be argued that the typewriters specified in that letter were not actually delivered, but the correspondence running through Exhibit No. 8 indicates that our opinion is correct. It is interesting to note that in Exhibit No. 8 Westex told the Chilean agency by telegram:

"Our option expires Thursday morning. Imperative you cable confirming acceptance . . . Cabled credit forthcoming for expediting credit must be established with Union Trust Company, Washington, D. C., favor of our agent Sidney A. Inman. . . ."

To see how the deal was progressing we need only look at Exhibit No. 11, a letter from Westex to Sidney Inman dated August 10, 1944, in which the question of profit is fully discussed. In the brief for Appellant it has set up some figures which are supposed to represent the sale price. However, the documents here submitted are to the contrary. (Exs. 4-7-11-35)

It will be noticed in going through the various exhibits that none of the correspondence is with United, but between Westex and the Chilean agency, and Inman and Westex, and none of it deals with the rights of the typewriter supplier, but seems to be concerned primarily with getting the money up in Inman's hands and making sure of the additional charges that will be added on to the original price.

The deal started off, as will be seen from the original papers, as a sale of used typewriters. (Ex. 1) (R. 177) There came a time in the course of this dealing when Westex and Inman were having trouble getting the extra

ten per cent out of the letter of credit which was being handled by the Chase National Bank and the Union Trust Company. At this point we begin to see Inman and Westex having difficulties about invoices on the stationery of United. An examination of the records (Exs. 42 through 47, etc.) discloses the difficulties encountered by Westex and Inman in getting their portion of the money and how they handled it; and we finally come to Exhibit No. 51 which was a letter to the Chase National Bank from Westex on October 24, 1944, in which they said in part:

"We have been authorized by the Compania Commercial Chilean Agencies, S. A. to receive this amount as our commission for handling, and services rendered in connection with this transaction. . . ."

And thus the matter ran on until we find, on the 6th of November, 1944, Westex writing to Inman (Ex. 54):

"This brings up the question of charges which will have to be added to the invoices so that these can also be collected against the letter of credit. These must definitely be shown on invoice forms of the United Typewriter and Adding Machine Company. If we are supplied with the sufficient number of blanks, we can do this right here in New York, . . ."

The commission claimed in this letter was based on the value of \$16,827.85 plus the cost of transformers; and on November 9, 1944 (Ex. 56) the amendment to the letter of credit was received by Inman. However, it must be noted that a few days later Inman wrote to Westex (November 13, 1944; Ex. 82) as follows:

"We have today received the amendment to the letter of credit authorizing the charge of 10% but the amendment makes no reference to 'used' typewriters. I hope this does not result in trouble."

As a result of the attempts by Westex to get its ten per cent extra it succeeds in amending the letter of credit and

in eliminating the used typewriter feature, which afterwards resulted in the claim by the South American agency that it had gotten used typewriters and not rebuilt typewriters (Exs. 65, 67 & 70). However, immediately before that period Westex had written to the Chilean agency telling it that *the supplier who had rebuilt* the typewriters on its order was the United Typewriter and Adding Machine Company. We do not believe that there will be found in the record any support for the statement as to quality of the merchandise made by Westex to the Chilean agency.

During this same period it is interesting to also note that Westex was writing to Sidney Inman (Ex. 64, Dec. 5, 1944) explaining how Inman would be able to obtain payment of his draft out of the letter of credit, and part of the suggestion was that the United Typewriter invoices must be made out to the name of "Compania Chilean Commercial Agencies, S. A.". This suggestion made in December of 1944 came after the merchandise had been shipped to New York for overseas.

The Chilean agency had re-organized, as shown by Exhibit No. 5 of August 3, 1944, and thus its new name had to be correctly stated.

Difficulties in the transaction did occur as shown by the exhibits,—for instance, Exhibit No. 31 was a letter to Westex from the Chilean agency wanting to get out of the sale because of the influx in Chile of Swedish typewriters, making the market bad for the sale of typewriters. There was also a letter dated the 13th day of September, 1944 (Ex. 27) to Westex from the Chilean agency in which it called attention to the fact that the Underwood people had begun to manufacture and export new typewriters. Now when the Chilean agency wanted to get out of the contract Westex advised the Chilean Agency as follows (Ex. 37): That the machines were going to be practically new and look like new (although it had no support for such statement) and it further said:

"We have been most emphatic on this point with the typewriter company supplying this equipment and have their assurances . . ."

and it gave a much broader promise than that agreed to by Appellee; and it also told the Chilean agency:

"Frankly this transaction is entirely out of our hands since we are acting simply as brokers, and it was for this reason that we requested you to open a letter of credit in favor of Mr. Sidney A. Inman in Washington, D. C., who is the principal in this business. . . . Since we turned over the additional 5% which you had offered us to our principals at the outset in order to expedite rebuilding . . ."

This was completely false, as we have noted above the difficulty of getting the ten per cent out, and also Westex had never at any time contacted United Typewriter for a change in the sale terms, but simply had written to Inman on the 5th day of October, 1944 (Ex. 32):

"... It put us in a most uncomfortable position with a very good client. . . ."

This was said in a letter in which it was trying to get Inman to persuade United Typewriter to reduce its prices.

Inman replied on the 6th day of October, 1944 (Ex. 33) that he could not get United to reduce its prices, but on that date and in that letter Inman said:

"If you will furnish me the name of the firm and address or person to whom the machines are to be shipped as well as the complete address, I believe that we can make shipment of the entire lot. . . ."

This was in reference to the request by Westex that all the machines be shipped at one time rather than in two lots as originally planned. So we know, as late as October 6, 1944, neither Inman nor United Typewriter knew to whom Westex had sold the machines.

However, Westex did not furnish the information; and six days later we find Inman again writing to Westex (Ex. 35) requesting to whom it desired the shipment to be made.

In order to further determine in what capacity the parties were acting let us examine Exhibit 14 which is a letter from Inman to Westex dated the 14th day of August, 1944. This exhibit is extremely helpful in that it contains the following clause:

“... experiencing difficulty in inducing the supplier to hold the merchandise for us.”

The testimony by depositions clearly shows that the relationship between United Typewriter and Westex was not that of principal and agent. No useful purpose will be served in citing cases when the question before this Court is whether there is any credible evidence to support the claim that Westex was the agent of United Typewriter, or became such by ratification. In all the documents offered in evidence not one bit of correspondence between Westex and United appears, but Westex' counsel has seized upon the invoices on the form of United Typewriter and apparently addressed to the Chilean Agency. These invoices do not support the claim of counsel, as the dates on most of them are long prior to the time that even Inman knew the name of the party purchasing; and the correspondence between Inman, Westex and the banks, seeking to get out the ten per cent commission, clearly describes how and why the forms were given to Westex to make up invoices so that it could obtain this percentage.

In any event, it is clear from the records and the testimony that Westex, by its original arrangement, was not the agent of United Typewriter (Ex. 1).

It is also clear that Westex made promises far beyond the arrangement it had with Inman, and caused the difficulty which fell upon its head at a later date. It was so

anxious to get that money that it misrepresented to everybody what the situation was, as it is perfectly clear from the record that nobody ever wrote to United Typewriter and told it that the Chilean agency did not want the deal. From the record it is clear that United Typewriter had sales for this merchandise at the time Chile was flooded with Swedish machines and that the United Typewriter Company could have sold the machines easily without the difficulty which was occasioned. The real trouble in this case came from the large profit that Westex had figured to make and made on the deal. Now there is some evidence in the record as to the amount that Westex' books showed it received. However, we know that the letter of credit was \$22,000.00, and we know that the bill of United Typewriter was \$16,827.85, and included the commission as the invoice (Ex. 47) was actually for \$15,062.75. According to the complaint filed by the Chilean agency the contract was for \$19,974.13.

Now it is also very clear that Inman did send to Westex a check for costs, which Westex had outlined in a letter of December 11, 1944, which for some reason was never offered in evidence by Appellant. The check that Inman gave to Westex was remitted on the 12th of December and appears as Exhibit No. 85. The check was in the sum of \$2,581.58. So it will be seen that the testimony of Mr. Block at pages 91 and 92 of the record represents only the costs and not the commission.

As to proof of agency see *Mack v. American Security & Trust Co.*, (89 U.S. App. D.C. 324, 191 Fed. (2d) 775):

"As between themselves, the relationship of principal and agent could not arise in the absence of such consent, though, as we have seen, such consent may be implied."

SUIT FOR EXONERATION BY A TRUSTEE IN BANKRUPTCY OF A NO-ASSET CORPORATION WILL NOT LIE.

Exoneration of a corporation voluntarily in bankruptcy is not a proper action by a trustee of that bankrupt corporation. This is particularly true where the corporation has ceased to do business almost two years prior to the bankruptcy petition. This no-asset bankruptcy cannot necessitate any action by the trustee to exonerate said corporation of possible liability.*

Under the Bankruptcy Act the trustee is limited by law in his right to bring actions, it being his duty under Title 11, Section 75 of the Federal Code Annotated to: "collect and reduce to money the property of the estates for which they are trustees . . ." See "Remington, On Bankruptcy", 4th Edition, Vol. II, Sec. 1128, and the cases collected under Note 16. See, also, *In Re Nast*, 2 A.B.R., n.s. 817, and the quotation appearing on page 828; and *McKenzie v. Irving Trust Co.*, 293 N.Y. 347, affirmed in 323 U.S. 365 (in said case the court determined that a trustee in bankruptcy had no authority to bring an action to establish a superior title in some other person).

The original suit brought was for damages and as such could have benefited the estate, but when the Trustee in Bankruptcy realized that he had no cause of action for damages and changed his entire cause for one for exoneration, the new action was not for and could not have been for the benefit of the bankrupt estate. Counsel for Appellant may argue orally, as they did below on certain motions, that they seek to have the South American company paid so as to clear the name of The Westex Company. It is believed that no such power or right exists in any trustee in bankruptcy.

* The bankruptcy petition and Statement of Affairs was filed in the District Court and is part of the record there. The Statement of Affairs prepared by Westex shows that it ceased to do business on December 31, 1948.

**LACHES OR THE STATUTE OF LIMITATIONS
BARS THE CLAIM**

Presuming for the sake of argument that an agency had been established, and presuming that there had been misconduct on the part of the Appellee and that the Appellant had suffered thereby, still the bar of the statute of limitations and/or laches prevents any recovery.

As early as December 2, 1944, the Chilean agency had obtained from Westex, by letter (Ex. 60) the name of the supplier as the United Typewriter Company; and on the same date Westex had cabled to the Chilean agency the name of the supplier (Ex. 62); and Westex had claimed that it had written assurance of the quality of the goods in its letter to the Chilean agency of the 26th day of February, 1945 (Ex. 73), and Westex in said letter told the Chilean agency that United would be held to its guarantees on the equipment supplied. While it is obvious and clear from the evidence that no such guarantees ever existed nor any representations by the supplier made to support the promises of Westex to the South American company, yet Westex had made that claim at that time; and Westex further in said letter stated:

“We shall be able to advise you of the definite steps being undertaken to secure satisfaction from the supplier.”

at that early date; and it is definitely established by the record (Ex. 74) that the Chilean agency had written on the 7th of March, 1945 to Westex, in part, as follows:

“We would like to point out, however, that since this transaction was carried out directly with your good selves, any compensation paid to us should come directly from yourselves regardless of any arrangement made between yourselves and supplier.”

We therefore submit to the Court that as early as the beginning of 1945 The Westex Company was on notice of

the claim of the Chilean agency and the fact that said agency was going to insist upon satisfaction from Westex itself rather than claim against the supplier. Westex allowed the suit to be filed in December of 1945 and gave no notice and made no demand upon United until 1950, when its counsel requested the President of United to appear as a witness on its behalf in New York. This, he did. However, it was in July of 1950 when the damage suit by Westex' trustee was filed in the District Court in Washington, D. C.

Using the date that the damage suit was filed (July 18, 1950) and ignoring the later date of November 30, 1951, when the exoneration suit first appeared as an amendment, it is clear that the cause of action, which accrued in December of 1945 at the latest, is barred by laches and the statute of limitations. The decision of this Court in *Noel et al v. National Savings and Trust Co.*, 81 U.S. App. 351, 158 F. (2d) 410, is, in the opinion of counsel, decisive of the action. In that case the executor administering an estate negligently allowed the statute of limitations on one of the notes in his possession as executor, to run. The beneficiaries of the estate received said note from the executor of the estate at a time when the statute had run. Nevertheless, they sued the maker of the note and he pleaded the statute of limitation. The plea of the statute was supported by the court and by this Court, and after the decision of this Court the beneficiaries sued the executor, claiming the negligence in allowing the statute to run had caused them damage. This Court said that it did not need to decide whether the cause of action by the beneficiaries against the executor accrued at the time the note became barred by the statute of limitations or whether it accrued when the note was turned over to the beneficiaries by the executor, nor when the statute of limitations was first pleaded, because in that case all of those dates were more than three years before the bringing of the damage suit against the executor. The claim by the

beneficiaries that the statute did not start running in favor of the executor until the suit on the note had finally been determined by this Court of Appeals was held to be without merit. It is true that in that case the principals were suing an agent and not, as in this case, an alleged agent suing a principal, but it is respectfully submitted that that distinction does not create any difference in the law. The point is, we submit, that this Court need not determine whether the statute ran three years after the delivery of the merchandise or three years from the bringing of the action by the South American company against Westex, because both dates are long prior to the three year statute.

It was argued below—and probably will be argued here—that the exoneration suit did not have to be filed until after the trial on the merits. This is really a different way of stating the same proposition which this Court said was without merit.

**CLAIM FOR REIMBURSEMENT FOR EXPENSES OF
DEFENSE IS UNSUPPORTED BY ANY CREDIBLE
EVIDENCE.**

The only suggestion of any testimony to support the claim that \$2,000.00 was spent by The Westex Company in defending the case is an attempt to use the testimony of Mr. Block for such purpose. That his testimony is not in evidence of such payments is borne out by the record at page 140 where the following occurs:

“Question: Then tell me from your personal knowledge how much was paid and to whom?”

“Answer: Well, I pay out a great deal of money at different times.

“Question: I didn’t ask you that, sir.

“Answer: You can’t remember those things as far back as that. I tell you very frankly I don’t remember.

“Question: Then you have no personal knowledge of any money having been paid in connection with the defense of this suit, is that correct?”

“Answer: Well, it must have been paid.

“Question: I didn’t ask you that, sir. You can answer that yes or no.

“Answer: I don’t remember. I think these files will clear up a lot of that stuff.”

There is a total absence of any checks or records showing such payments and there is a complete absence of proof. We are not dealing with what Mr. Block may have paid personally, if anything was paid by him, but we are only dealing with what Westex—which had been out of business for much longer than a year—was supposed to have paid. The attorneys who received the money could have testified to the receipt of the same, but they were not called nor was their deposition taken. Their records were not subpoenaed nor used and no real attempt was made to prove any such payments as had been claimed in the pleadings.

NO EVIDENCE WAS OFFERED THAT APPELLEE HAD BEEN GUILTY OF BREACH OF CONTRACT OR NEGLIGENCE ARISING OUT OF SAID CONTRACT.

No evidence was offered to prove that the Appellee had breached its contract for the sale of typewriters, etc., nor was any evidence offered that Appellee had been negligent in carrying out the terms of its contract. Appellant’s position was that because a judgment had been taken against Westex by the Chilean agency, Westex need not prove the damage feature of its case against Appellee, as it apparently claimed that the decision in the first case in New York was *res judicata* of that issue here. The case of *Green et al v. Brophy et al*, 71 App. D. C. 299, 110 F. (2d) 539, in our opinion, holds to the contrary.

The question of the statute of limitations and laches is discussed elsewhere, but it is obvious that in order for Appellee to be bound by any such decision it should have been a party to the proceedings or, at the very least, been pressed to exonerate Westex.

The Appellant's case fails wholly to establish any conduct on the part of this Appellee to justify any claim against it.

CONCLUSION

No proof of agency was offered and the court's decision was clearly right.

Additionally, the other defects in the Appellant's case were not overcome by him, and on any one of those grounds alone affirmance is proper.

MARK P. FRIEDLANDER,
HYMAN GOLDSTEIN, and
NORMAN FREEDENBERG,
Attorneys for Appellee,
Rm. 502, Hill Building,
839 17th Street, N.W.,
Washington 6, D. C.